Supreme Court of the United States

No. 227.

BENJAMIN STARK,

APPELLANT,

vs.

BACON, *et. al.*

Appeal from the Circuit Court of the United States for the District of Oregon.

APPELLANT'S BRIEF.

J. S. BLACK,
Counsel.

McLAUGHLIN BROTHERS PRS.

STARK,
vs.
BACON, *et. al.*
No. 227.

This suit is by different plaintiffs against the same defendant. The plaintiffs claim, under the same title as the plaintiff in No. 225, another part of the same Block No. 81.

The pleadings in this case do not raise the question whether the former suit of Starr against Stark was or was not a bar. It seems to have been conceded on all sides that the record in that case could not be set up for that purpose. This case, therefore, stands upon the title under Stark through Chapman. For all the reasons given in case No. 225 we maintain that that title is worthless, and we assign here the errors numbered 1, 2, 3 and 4, in our brief on the case No. 225.

J. S. Black
of Counsel

Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

No. 225.

BENJAMIN STARR, Appellant,

vs.

LEWIS M. STARR, Appellee.

PHILADELPHIA BAR ASSOCIATION

BRIEF FOR APPELLEE.

Geo. H. Williams,
For Appellee.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1876.

No. 225.

BENJAMIN STARK, APPELLANT,

vs.

LEWIS M. STARR, APPELLEE.

BRIEF FOR APPELLEE.

F. W. Pettygrove, on and prior to March 22, 1848, claimed the Portland land claim. On that day he conveyed it to D. H. Lownsdale, (Record, 19.) Lownsdale, on the 22d of March, 1849, conveyed one half to Coffin, (Record, 21 and 22.) On the 13th of December, 1869, Chapman became equally interested with Lownsdale and Coffin; each owning an undivided one third of the claim, (Record 22.) They laid off portions of the claim into blocks and lots, which they sold, giving deeds with warranty against all the world, except the United States. January 8, 1850, Lownsdale went to San Francisco, leaving Coffin and Chapman in charge of the claim, giving, before he left, a general power of attorney to Chapman, in which, also, there is a particular power to sign deeds for Portland lots, (Record, 137.) While in San Francisco, Lownsdale met Stark, the appellant in this case. Stark, it seems, had set up a claim to one half of the Portland land claim, asserting that he had purchased it from one Lovejoy, but there is no evidence of this in the Record. Lownsdale and Stark then and there entered into

an agreement (Record, 8) to adjust this controversy, in which it was stipulated that Lownsdale should relinquish all claim to the land north of a certain line, (now Stark street,) and that Stark should relinquish all claim to the land south of that line, excepting certain lots which, before that time, had been sold. This agreement was made subject to the ratification of other parties claiming under Lownsdale, (meaning Coffin and Chapman.) Lownsdale returned to Portland with this agreement, but Coffin and Chapman refused to ratify it unless the lots which they had sold during Lownsdale's absence in San Francisco were also excepted. Couch was the agent of Stark in Portland, with full power of attorney to act for him, (Record, 151.) Coffin and Chapman ratified the agreement between Stark and Lownsdale, so modified as to put the lots sold by them during Lownsdale's said absence upon the same footing with the other lots excepted in the body of the agreement from the mutual conveyances of Stark and Lownsdale therein contained, (Record, 10.) This agreement, so modified, was ratified by Couch as the agent of Stark, (Record, 10.) All these arrangements were in writing and duly recorded in November, 1850, (Record, 10.) While Lownsdale was in San Francisco, Lownsdale, Coffin, and Chapman (Chapman acting as Lownsdale's attorney) sold to Lownsdale Block 78. They, at the same time, sold to Coffin Block 79, and to Chapman Fractional Block 81. The latter block lies north of Stark street, and is the property in controversy. Starr, through several mesne conveyances, holds under Chapman. Chapman, immediately after his purchase as aforesaid in 1850, entered into possession of the property, and ever since he and his grantees have had possession, making large and valuable improvements upon it. Stark, in 1860, obtained a patent for that part of the Portland land claim lying north of Stark street. Stark came to Portland from San Francisco in June, 1850, but did not disavow the action of Couch in consenting to the modification of said agreement, but, on

the contrary, expressly sanctioned it, and all parties recognized and acted upon it till Stark set up a claim to this property in 1861. Stark knew of the improvements made by Starr and his grantors, and did not object; but, on the contrary, at various times and under various circumstances, recognized Starr as the owner, and promised to make him a deed when he, Stark, obtained a patent.

In 1864, A. M. Starr and this plaintiff then being joint owners and in possession of the property, commenced a suit against Stark in the circuit court of Multnomah county, Oregon, in which they charge:

1st. Their equitable title substantially as in this case, and a patent under the town site law to the city of Portland.

2d. The invalidity of Stark's patent.

The court, on motion of defendant, compelled the plaintiff in that suit to choose between these two grounds of action, holding that they were inconsistent with each other. (Record, 82.)

Plaintiffs then withdrew their claim for equity as against Stark, and it was stricken from the case, which then proceeded exclusively upon the claim that Stark's patent was invalid.

The circuit and supreme courts of the State decided in favor of the plaintiffs, but this Court reversed the decision.

There are two questions in the case:

1st. Is Stark equitably estopped, and ought he to be enjoined from now claiming this property, and required to make a deed thereof to Starr?

2d. Is Starr estopped by the proceedings in said suit of 1864, from setting up his equitable title in this case?

1st. It seems perfectly clear that the modifications of the agreement between Stark and Lownsdale, made by Coffin and Chapman, and ratified by Couch, are to be treated as though they were a part of the original agreement.

This results not only from Stark's power of attorney and written instructions, (Record, 151 and 152,) which Couch held at the time he ratified these modifications for Stark, but from the fact that Stark when he returned to Portland, and became acquainted with said modifications, not only did not disapprove but expressly assented to and adopted them. (Record, 134 and 111.)

This being so, Stark agreed to "ratify and confirm" Lownsdale's sale to Chapman, of the property in question. Stark acquired the possession of the north part of the Portland land claim under said agreement, with the view of obtaining title from the United States, and when, therefore, he agreed "to ratify and confirm" the sales previously made by Lownsdale, he must be understood as referring to his future acquisition of title. Stark admits in his answer (Record, 19) that this is the proper construction of the agreement made by him with Lownsdale in San Francisco. If he is bound by the ratification of Couch, he is bound to convey the legal title of said block 81 to Starr, for the ratification puts that upon the same footing with other property, the legal title of which he admits he is bound by said agreement to convey. Moreover, the other parts of the agreement clearly indicate that it was to bind the parties for all future time and under all circumstances, for they covenant with each other as to the lands conveyed, "that neither party nor his heirs, nor any person claiming under him or them *shall, at any time hereafter*, by any way or means, have, claim, or demand any right or title," &c. (Record, 9.)

This agreement was a compromise of conflicting claims to public lands, and makes Stark a trustee as to any lands

thereby conveyed or confirmed to Lownsdale or his grantees, and to which Stark afterwards obtained the patent.

Rose *vs.* Treadway, 4 Nevada, 455.
McCoy *vs.* Hughes, 1 Iowa, 370.
Brooks *vs.* Ellis, 3 Iowa, 527.
Bryant *vs.* Hendricks, 5 Iowa, 257.
Snow *vs.* Flannery, 10 Iowa, 318.
Lamb *vs.* Davenport, 18 Wallace, 307.

Stark is estopped by his acts from claiming as against Starr the land in controversy,

1st. When he came from San Francisco to Portland, and was made acquainted with what Couch had done as his agent, and saw Chapman's grantees in possession of and improving said block as their own, he did not, as it was his duty to do if he intended to claim the property, disavow the acts of Couch, and notify those in possession of the disavowal and his claim.

Record, 140, 141, 118, 119.

2d. Starr put upon this property about $10,000 worth of improvements, claiming to be its owner; not only with the full knowledge and consent of Stark, but with Stark's express assurances from time to time that when a patent was issued to him he would give Starr a deed for the lots in question.

Record, 131, 133, 106, 162, 161, 759, 763.

3d. When Stark was about to apply for his patent, apprehensive that opposition might be fatal to his claim, he promised Starr and others that if they would allow him to procure a patent he would give to *bona fide* lot-holders deeds for their property, and Starr relying upon these promises not only acquiesced but assisted him in such application. There is not a particle of evidence that Starr looked to any other source for title. That Stark was in danger of defeat, if

opposition had been made, is evidenced by the fact that, subsequently, the circuit and supreme courts of the State found and decided that Stark was not entitled to his patent under the donation law, and this court did not overrule their findings, but reversed their decisions upon another ground.

Record, 106, 134, 113.

Stark *vs.* Starr, 6 Wallace, 402.

4th. When the city of Portland, claimed as a public levee, this and other property similarily situated on the bank of the river, and a suit arose, Starr and others occupying the block in question, contributed to the expenses of the suit upon the assurance of Stark, that if the claim of the city was defeated they would have a good title, and should have deeds when he obtained a patent. (Record, 106, 114, 107.) The suit of the city was defeated.

Parrish *vs.* Lownsdale, 21 How., 290.

5th. Stark, by his declarations and acts for a period of ten years induced the occupants of this property to expend their money for its improvement knowing that they claimed to be owners and expected a conveyance from him when he obtained his patent.

Chancellor Kent in Wendell *vs.* Van Ranssalaer, 1 John. Ch., 353, says:

"There is no principle better established in this Court, nor founded on more solid considerations of equity and public utility than that which declares that if one man knowingly, though he does it passively by looking on, suffers another to purchase and expend money upon land under an erroneous opinion of title, without making known his claim, he shall not afterwards be permitted to exercise his legal right against such person."

Mr. Justice Miller in Ins. Co. *vs.* Wilkenson, 13 Wallace, 233, defines an estoppel in *pais*, as follows:

"The principle is that where one party has, by his representations or his conduct, induced the other party to a tran-

saction to give him an advantage, which it would be against equity and good conscience for him to assert, he would not, in a court of justice, be permitted to avail himself of that advantage."

Stark having availed himself of all the advantages, to him, of said agreement cannot now repudiate the acts of his agent Couch in making it, nor can he refuse to be bound by those provisions in it beneficial to Lownsdale and his grantees.

Elwell *vs.* Chamberlain, 31 N. Y., 619.

It is believed that this Court, in the case of Lamb *vs.* Davenport, 18 Wallace, 307, has substantially decided the equities of this case in favor of Starr. Referring to certain agreements in that case, the Court says:

"We are satisfied that by the true intent and meaning of these agreements the *equitable right to all the lots in controversy had been transferred by Lownsdale to Coffin* BEFORE THE PASSAGE OF THE DONATION ACT, *and that, as between Lownsdale, Coffin and Chapman, the equitable interest, such as we have described it, of the lots in controversy,* WAS IN COFFIN OR HIS VENDEES. *The record shows that this interest or claim, whatever it was, at the commencement of this suit was vested in Davenport, while the legal title was in the heirs of Lownsdale. According to well settled principles of equity often asserted by this Court, Davenport is entitled to the conveyance of this title from those heirs, unless some exceptional reason is found to the contrary.*"

Again, referring to one of Lownsdale's contracts, the Court says:

"His contract of sale, made before the donation act was passed, and while he was the owner of the possessory interest before described, *was a valid contract* INTENTIONALLY PROTECTED BY THE DONATION ACT ITSELF, *and binding on the* TITLE *which comes to his heirs by reason of his death.*"

Respecting the value of the testimony offered by plaintiff in support of his bill, it may be said that it is not weak-

ened by any conflicting evidence, nor does defendant, though competent as a witness, venture to testify, for the very good reason, it is to be presumed, that he could not truthfully contradict plaintiff's witnesses.

Is Starr estopped by the proceedings in said suit of 1864, from setting up his equitable title in this case?

Pages 83 and 89 of the Record show the issues made by the pleadings in the suit of 1864. Stark did not in that suit contest the possession and improvements of the Starrs, but by the amended complaint and answer the contention was limited and confined to the validity of Stark's patent, and the patent to the city. It is not pretended that the questions involved in this case were litigated or determined in that case, but it is claimed that they might or ought to have been so litigated and determined. To this there are several answers:

1st. When the suit of 1864 was originally brought, the bill contained in substance what the bill in this suit contains, together with a claim for relief upon the ground that Stark's patent was fraudulent and void, and that the patent to the city was valid and protected plaintiffs.

Stark demurred and objected, and upon his motion the Court ordered the Starrs to elect between the claim under the city title and the claim that Stark's patent was void. This order is a complete answer to Stark's plea of estoppel in this case. There was no way that the Starrs could evade or avoid the order. Thep could not appeal from it because it was an interlocutory decree. They could not appeal from the final decree because it was in their favor.

2d. This order was correctly made.

One part of the bill in the suit of 1864 charged, in effect, that Stark had the legal title to the property, and that he had made an agreement to convey it to plaintiffs, and a specific performance of the agreement was prayed. The other part of the bill charged that plaintiff was in posses-

sion of the property, that the legal title was in the city of Portland for their benefit, and that Stark's fraudulent and void patent was a cloud upon their title, the removal of which was prayed. These allegations were inconsistent with each other. One affirmed the validity of Stark's patent, the other its invalidity. One affirmed that the legal title was in Stark, and the other that it was in the city of Portland.

Phillips *vs.* Berick, 16 John., 140.
Daniel Ch. Practice, 726, 727.

3d. Plaintiffs in one suit cannot be barred by what was not determined in another, unless there were laches or negligence on the part of plaintiffs in a former suit.

Le Guen *vs.* Gouverneur, *et al.*, 1 John. Cases, 492.

The Starrs were not guilty of negligence in the suit of 1864. They did all they could to have the questions now before the court litigated in that case. They were compelled by the court to abandon "one cause of suit," to use the language of the order. They chose, as they had a right to do, to attack Stark's patent, and the correctness of their choice was affirmed by the circuit and supreme courts of the State. Their judgments were reversed by this court upon a question preliminary to the merits.

Had the Starrs voluntarily withdrawn "one cause of suit" from the action of 1864, they would not now be barred as to that "cause of suit." In the case of Foster *vs.* Milliner, 50 Barbour, 385, the court say:

"It is entirely clear that a *cause of action* may be withdrawn at or before the trial, and so may a distinct matter of defence which is not necessarily a part of the plaintiff's case to overcome and establish, in order to make out his right to recover. And as to *matters so waived and withdrawn*, the trial and judgment are no bar."

According to well settled rules of law the adjudication in the suit of 1864, is not a bar to this suit.

1st. Because the subject-matter of the two suits is not the same. The subject-matter of that suit, so far as the facts are concerned, was whether or not Stark had falsely represented to the Government that he had complied with the provisions of the donation act, and so by fraud obtained his patent.

The subject-matter of this suit is whether or not Stark had agreed by writings, words and acts, to convey to Starr the legal title vested in him by a patent from the United States. There must be an identity of subject-matter to make the judgment in one suit a bar to another.

Freeman on Judgments, pars. 252, 257.

2d. Because the evidence necessary and proper to support the issue in the former case would not prove or be relevant to the issue in this case. Here the evidence wholly relates to right of Starr to a deed from Stark. There the evidence wholly related to the right of Stark to a patent from the United States. It is the test, to know whether a final determination in a former action is a bar or not to a subsequent one when the same evidence will support both actions.

Freeman on Judgments, 259.

Mr. Justice Clifford, in the case of Goold *vs.* Evansville R. R. Co., (1 Otto, 534,) says:

"It is equally well settled that if plaintiff fails on demurrer in his first action, from the omission of an essential allegation in his declaration, which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right."

Morris' Administrators *vs.* Stewart, 1 Iowa, 375.
Buchanan *et al. vs.* Upshaw, 1 Howard, 56.

A claim founded upon a title that comes collaterally

into dispute in a case where there has been judgment, is not barred by that judgment.

Freeman on Judgments, par. 258.

Section 723 of the Civil Code of Oregon is as follows:

"The effect of a judgment, decree, or final order in an action, suit, or proceeding, before a court, or judge thereof, of this State, or of the United States, having jurisdiction to pronounce the same, is as follows:

"1. In case of a judgment, decree, or order, against a specific thing, or in respect to the probate of a will, or the administration of the estate of a deceased person, or in respect to the personal, political, or legal condition, or relation, of a particular person, the judgment, decree, or order, is conclusive upon the title to the thing, the will, or administration, or the condition, or relation, of the person.

"2. In other cases the judgment, decree, or order is, *in respect to the matter directly determined*, conclusive between the parties and their representatives and successors in interest, by title subsequent to the commencement of the action, suit, or proceeding, litigating for the same thing, under the same title, and in the same capacity."

It will be seen seen that by this statute the judgment is made conclusive only *in respect to the matter directly determined.*

Section 726 is as follows:

"That only is deemed to have been *determined* by a former judgment, decree, or order, which appears upon its face to have been so determined, or which was actually and necessarily included therein or necessary thereto."

Whatever, therefore, may have been the common-law rule upon this subject, it is the law of this case that nothing was determined in the suit of 1864, except what appears upon *the face of the decree, or was actually and necessarily included therein, or necessary thereto.*

See Decree, Record, 97.

Said decree has the same effect in this court that it would have in the courts of Oregon.

Hamplin *vs.* McConnell, 3 Wheat., 234.

It is respectfully submitted, that the able and exhaustive opinion of the Circuit Judge in this case, is conclusive for appellee.

Record, 182–202.

GEO. H. WILLIAMS,
For Appellee.

Arkansas Rock 22 Ct 255

2 Smith Sewerage Cases 673

Arkansas v. Kansas 4 How 467

Pennsylvania v. Wheeling 24 How 333

1 Oliv 557

Stanbridge agreement between
Thos Symmes dated
March 1 1852
Amount due Oliver
& Chapman on Stock 13/8 5
Patent Due 8/1860 6 7 5
Patent to be Paid
Dec 1 1860 Interest
6 84

4-493
A-996

Record not printed

Supreme Court of the United States.

WRIT OF ERROR TO SUPREME COURT OF CALIFORNIA.

W. H. CLARK
vs.
C. R. HANCOCK,
JOHN KELSO.

Take notice that I will move to dismiss the writ of error filed by you in the Supreme Court of the State in the above cause, on the ground that no Federal question is involved in the decision of the case; copy of the Record together with this motion are filed this day.

The above motion will be made on the 28 Feby 1877.

P. PHILLIPS,
For Defendant in Error.

WASHINGTON, 6 *February*, 1877.

To Messrs: Durant & Horner
Attys for plff in Error

Motion to dismiss

Brief.

In the District Court, for the third judicial district of California, this suit was instituted against Clark on the following contract:

By an agreement duly executed by and between the city of San Francisco and one John Henry, certain streets were graded. On the performance of the work the city issued to said Henry a warrant for the amount due thereon, together with a diagram and an assessment, showing the several amounts due by the individual lot holders situate on said streets.

Henry, as authorized by the terms of the warrant, assigned all his interest therein to Hancock and Kelso. A demand was made on Clark, a lot owner, for the amount shown to be due by him on the assessment, and on his refusal to pay this, suit was commenced in June, 1872.

A demurrer, consisting of fourteen grounds of objection, was filed—(p. 20,) of the printed record filed in the Supreme Court of this State.

This being overruled, an answer was filed, pp. 25 to 34.

The case was tried on a submission to the court.

Special findings of the facts are set forth, pp. 35 to 45.

On the 1st April, 1875, judgment was rendered in favor of the plaintiffs for $7,930, with $139 for costs, p. 55.

On the 12th April, 1875, a new trial was moved for on the grounds——

1. That the evidence was insufficient to justify the findings.

2. That the findings and decisions are against law.

3. For errors of law which were excepted to, p. 54.

The specifications under these heads extend from page 58 to 103, in which all the grounds of objection, both as to the evidence and law, are fully set forth; and on the 12th July, 1875, p. 103, the motion for new trial was overruled.

The case was then taken to the Supreme Court of the State, when, on the 3d October, 1876, it was adjudged —" that the judgment and order denying a new trial be, and the same is hereby affirmed with costs."

The opinion of the court herein being delivered from the bench.

After a careful review of this case, I am justified in saying that there is not the slightest pretence for the writ of error which brings up the judgment of the highest court of the state for review.

We submit that such an attempt as this should be ~~dis-~~ discouraged ~~regarded,~~ and that it would be a fitting case for the allowance of damages, if damages were allowable, on a motion to dismiss for want of jurisdiction.

P. PHILLIPS.

Supreme Court of United States.

W. H. CLARK
vs.
HANCOCK & KELSO.

Writ of Error to Supreme Court of California.

A motion has been submitted to dismiss this case for want of jurisdiction, there being no Federal question raised by the record.

The final judgment was rendered on 3d October, 1876. The writ of error was lodged on 16th November, 1876, in the clerk's office, and on same day a supersedeas bond was filed.

The writ of error is made returnable to the October Term, 1877.

The only reply that has been made to the want of jurisdiction is a denial, and that this motion to dismiss is premature, and cannot be heard until the return day in the writ has expired.

This was understood to be the rule of practice prior to 1871, when the contrary practice was established in the case of *ex parte* Russell, 13 Wall., 671.

The propriety of this rule is well illustrated by the facts of this case.

The judgment was rendered on 6th October, 1876, and the writ could have been made returnable under the rule to the present term.

The election is made of the succeeding term, so as to gain a year or more by the operation of a supersedeas bond when, in fact, there is nothing in the record to sustain the jurisdiction.

An enforcement of the rule as it now stands will prevent fraudulent calculations based upon the present crowded condition of the docket.

To settle the practice, I have also submitted in this case a motion to set aside the supersedeas.

The supersedeas bond, as is seen, was lodged with the clerk, together with the writ of error, forty-three days after the judgment was entered.

The 24th section of the Judiciary act requires, for the operation of a supersedeas, that the writ should be lodged with the clerk within *ten* days, "until the expiration of which time execution shall not issue.

This section deals with the federal tribunals.

But the 25 section, providing for the writ of error to a State court, declares that a case thus brought up shall be re-examined, in the same manner and *under the same regulations*, and the writ shall have the *same effect* as if the judgment complained of had been rendered in a court court of the United States.

At the present term the Court has held, that the pro-

vision in the 24 section, that no execution shall issue within ten days, does not apply to judgments in a State court, notwithstanding the descriptive words cited from the 25 section.

The supersedeas rests upon the statute, and not in the discretion of a judge or of all the judges constituting the court. It can only be made operative under this section by its being lodged within 10 days.

To secure this right within the ten days it is provided that no execution shall issue within that period.

Does the recent decision, which declares that the inhibition to issue the execution within ten days does not apply to State judgments, carry the consequences, that a lodgment of the writ of error within ten days does not operate as a supersedeas to State judgments?

Assuming it should be held that it does so operate, still the supersedeas in this case cannot be sustained, as the writ was not filed within the designated period.

The 11 section of the act of June, 1872, extends the time for giving the *bond* to operate as a supersedeas to sixty days, but this extension is expressly confined to the judgments and decrees of "*a district or circuit court.*"

The 25 section is substantially re-enacted by section 709, R. S.

By section 1007, R. S., it is declared that "where a writ of error *may be a supersedeas*," the writ of error and bond may be lodged with the clerk within *sixty days*, and where the writ may be a supersedeas no *execution shall issue until the expiration of the ten days.*

In the margin it is shown that the sixty days mentioned have been adopted from the act of June, 1872, and was intended to carry out the provisions of that act in conjunction with the provisions of the act of 1789.

It would thus seem to follow that as to judgments in a State court the only law operating a supersedeas is the 24 section of the judiciary act, and that the supersedeas allowed in this case must be dismissed.

P. PHILLIPS,
For Defendant in Error.

Supreme Court of the United States.

W. H. CLARK

vs.

HANCOCK & KELSO.

In Error to the Supreme Court of California.

On Motion to Dismiss, and Rule to Strike Record from the Docket.

BRIEF FOR PLAINTIFF IN ERROR.

The return-day of this writ of error is the second Monday in October, 1877.

Revised Statutes U. S., section 684.

Before the return-day this court has the power to make all such orders as may be required to keep matters in the same condition as when the writ of error was granted.

Esteben *vs.* Louisiana, 10 Wallace, 273–293.

That is, as we understand, in the exercise of your Honors' appellate jurisdiction you may, before or after the return-day, render any INTERLOCUTORY order needful to carry out the appellate powers of the court to a legal consummation and a fruitful judgment. But this power, whether before

or after the case is docketed, "*except in a case of urgent* "*necessity, in the exercise of a proper discretion*," will not be exercised "BEFORE THE RETURN-DAY."

It is equally well settled that your Honors can render no FINAL judgment on a writ of error unless the cause be docketed *during the term* to which it has been made returnable. To affirm, to reverse, or to dismiss, it is absolutely indispensable that the case be docketed at the term when it is made returnable; for each of these judgments is *final*, and not *interlocutory*.

See Rule 9, sections 1 and 2.
Stafford *vs.* Union Bank, 16 Howard, 139.

Now, although the defendant in error may have filed a copy of the record herein, yet the case is not "docketed" at the term set forth in Rule 9th, for that term has not yet come, and until the return-day of the writ arrives the adversary can no more move to dismiss than to docket and dismiss. Both motions are alike disorderly, and subversive of the rules of the court in these cases.

It is our duty to file the copy of the record in due time; the defendant in error has no right whatever to assume the performance of that duty for us, especially for the naked purpose of dismissal. He is cited or notified that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine.

Cohens *vs.* Virginia, 6 Wheat., 264.

It is altogether uncertain, *now*, whether plaintiff in error will desire to prosecute the writ of error further. For obvious reasons, the rule of court grants a delay for the preparation of the record for the Supreme Court to those who bring the WRIT, and this space of time cannot be le-

gally abbreviated in the mode here attempted by the defendants in error. We have "the first six [*judicial?*] days "of the term" within which "to docket the cause and file "the record thereof;" and until the full expiration of this time we may discontinue, *ex proprio motu*, our proceedings on the writ, without running any risk of damages for frivolity or delay, or a dismissal for want of jurisdiction. The reason seems to us obvious. A writ of error is a new suit, and defendant in a lower court may change his attorney.

7 T. R., 333, Bachelor *vs.* Ellis.

If frivolity, delay, or want of jurisdiction be apparent on the face of the record, the blame must attach to the new attorneys, not *before*, but *after* they have filed the record in this court. And in the large majority of cases they have no opportunity of examining the record until the near approach of the return-day; and only *then* does their retainer usually begin.

The defendant in error may *docket and dismiss* under Rule 9th at any time more than six days after the return-day. It is admitted, or it is beyond controversy, that no motion to docket and dismiss can be made *before* that time. *A fortiori*, a motion to docket and *dismiss for want of jurisdiction*, which in effect is the object aimed at in the present proceeding, cannot be heard, for the less can never include the greater.

Stafford *vs.* Union Bank, 16 Howard, 135.

We respectfully pray the motion be dismissed, and the docketing of the case cancelled and erased.

DURANT & HORNOR,
Attorneys for Plaintiff in Error.

WASHINGTON, D. C., *February* 9, 1877.